85-1634

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

Supreme Court of the United States

_____ TERM

RONALD W. CONNER and/or
BEVERLY B. CONNER PETITIONERS

VS.

SHELTER MUTUAL INSURANCE
COMPANY

RESPONDENT

PETITION FOR WRIT OF
CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION

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THE QUESTION PRESENTED FOR REVIEW

Whether the jury verdict in petitioner's favor, which verdict was based on admissible evidence, should have been reversed by the appellate court on the grounds that the evidence was insufficient to support the verdict.

LIST OF PARTIES

In the proceeding in the United States Court of Appeals for the Sixth Circuit, the plaintiffs-appellees-cross-appellants were Ronald W. Conner and Beverly B. Conner. The defendant-appellant-cross-appellee was Shelter Mutual Insurance Company.

All plaintiffs-appellees-cross-appellants above are petitioners herein.

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OPINION, ORDERS AND JUDGMENTS IN COURTS BELOW

The following are the pertinent Opinions and Orders in the Courts below, all of which are reproduced in the Appendix hereto, at the page numbers indicated.

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February 16, 1984, Judgment of United States District Court for the Western District of Kentucky, Paducah Division in Civil Action No. C82-0035 P(J)..... A-1

August 21, 1984, Memorandum Opinion of the United States District Court for the Western District of Kentucky, Paducah Division in Civil Action No. 82-0035 P(J) (officially reported, 600 F.Supp. 24)..... A-2

December 18, 1985, Opinion of the United States Court of Appeals for the Sixth Circuit, No.s 84-5837 and 84-5851 (officially reported, 779 F.2d 335)... A-22

January 14, 1986, Order of the United States Court of Appeals for the Sixth Circuit, in Nos. 84-5837 and 84-5851, denying rehearing..... A-43

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Opinion sought to be reviewed was filed in the United States Court of Appeals for the Sixth Circuit on December 18, 1985. (Appendix A-22) The Order Denying plaintiffs-appellees-cross-appellants' Petition for Rehearing was filed January 14, 1986. (Appendix A-43)

The jurisdiction of this Court is invoked on the ground that the Majority Opinion of the United States Court of Appeals for the Sixth Circuit weighed the evidence and therefore departed from the accepted and usual course of judicial proceedings.

The statutory provision which confers jurisdiction upon this Court is 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED HEREIN

U.S. Constitution, Amendment VII: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.:

Federal Rule of Evidence 401 Definition of "Relevant Evidence": "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Federal Rule of Evidence 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible."

STATEMENT OF THE CASE

History of Litigation

On October 3, 1981, Ronald and Beverly Conner sustained a fire that destroyed their home and damaged and destroyed its contents. (JA 1, 91)[1] It was stipulated by the parties that the loss exceeded the coverage. (JA 1, 133) At the time of the fire, the Conners' home was insured by Shelter Mutual Insurance Company (Shelter) through a homeowners insurance policy. At the time

---

[1] Citations to JA I and JA II refer to the Joint Appendices (Volume I or II) which were utilized by the parties in their appeals to the United States Court of Appeals for the Sixth Circuit. Although the Joint Appendicies have not been certified to this Court, citations are made to these documents for the convenience of opposing counsel or this Court in verifying statements in this Petition.

of the fire, the Conners were in Texas. (JA I, 91)

Following the fire, a representative of Shelter obtained statements from the Conners, investigated background information, furnished the Conners with proof of loss forms, and received those completed forms. (JA I, 113-118) On December 18, 1981, Shelter denied coverage for the fire based upon an alleged misrepresentation by Mr. Conner in an application for insurance. (JA II, 221-222)

The Conners filed this action against Shelter on Janaury 29, 1982. It was removed to the U.S. District Court for the Western District of Kentucky on March 2, 1982. The Conners sought pro-

ceeds from their homeowners policy, as well as compensatory and punitive damages, which relief was based on allegations of bad faith by Shelter. Shelter denied plaintiffs were entitled to damages and alleged that Mr. Conner had made material misrepresentations in the application for homeowners coverage.

A trial was held on February 8 and 9, 1984. Interrogatories were submitted to the jury as follows:

1. Was there a misrepresentation?

2. If so, was the misrepresentation material? and

3. Did Shelter breach its duty of good faith in handling the claim?

The jury found that there was a misrepresentation, but that it was not

material, because Shelter would have issued the policy anyway. The jury further found that Shelter breached its duty of good faith. The trial court entered judgment for the policy proceeds, less credits for sums previously paid by Shelter to the Conners' mortgagees, together with $20,000.00 awarded by the jury for Shelter's breach of its duty of good faith.

As a result of post-trial motions, the trial court affirmed the jury verdict for policy proceeds, but entered a Judgment N.O.V. against the Conners on their claim of bad faith, striking the $20,000.00 awarded by the jury on that claim.

Shelter appealed to the United

States Court of Appeals for the Sixth Circuit arguing that the trial court should have directed a verdict against the Conners, thus denying their claim for the policy proceeds. The Conners cross appealed, arguing, among other points, that the jury's verdict on their claim of bad faith was proper.

On December 18, 1985, the United States Court of Appeals for the Sixth Circuit held that the trial court committed error when it submitted the issue of materiality to the jury and that the trial court was correct in granting Shelter's Motion for Judgment N.O.V. on the issue of bad faith. There was a dissent by one of the judges of the panel of three. The dissent was based on the

position that the majority opinion weighed evidence that was within the province of the jury.

The Conners petitioned for a rehearing on December 24, 1985, and that was denied on January 14, 1986.

STATEMENT OF PERTINENT FACTS

The homeowners application which Shelter has argued was based on misrepresentations of Mr. Conner, was dated April 2, 1976. (JA II, 202) Although Mr. Conner contested the issue, the jury determined that he did misrepresent past convictions on the application. Those convictions are set out in the footnote in the Opinion of the United States District Court for the Sixth Circuit Court of Appeals. (Appendix A-23, A-24)

Regardless, the jury further determined that Shelter would have issued the homeowners policy, anyway.

However, the same Shelter agent who took the homeowners application on April 2, 1976 was also the Shelter agent who obtained the application for Mr. Conner's automobile insurance on April 12, 1976, ten days after the homeowners application was taken. (JA II, 202, 209) The application for automobile insurance contained Mr. Conner's statement of a prior conviction for driving while under the influence of intoxicants. (JA II, 209) Shelter did not cancel the automobile policy. Shelter did not cancel the homeowner's policy.

The Shelter adjuster who investi-

gated the claim following the fire testified that he had never been told that Shelter would not write insurance on someone charged with or convicted of a felony. Further, the adjuster testified that although he does not make the decision of whether to pay policy proceeds or not, so far as he knew, there was not an ironclad policy that claims such as Mr. and Mrs. Conners are turned down. (JA I, 112, 116)

Following the fire, on October 5, 1981, Shelter's adjuster received the assignment of the claim from Shelter's branch office in Owensboro, Kentucky. (JA II, 162) On October 7, 1981, the adjuster took tape recorded statements from each of the Conners. (JA I, 113)

The adjuster asked Mr. Conner whether he had ever been convicted of a crime, and he frankly admitted that he had. (JA I, 91)

Following the taking of the Conners' statements, the adjuster began searching the court records for Mr. Conner's convictions. He found those documents between October 7, 1981, and October 12, 1981, and sent them to Shelter. (JA I, 113-115)

On October 14, 1981, after obtaining the information concerning Mr. Conner's convictions, Shelter furnished Mr. and Mrs. Conner with proof of loss forms to complete. Mr. and Mrs. Conner itemized their losses on some thirty-two pages of proof-of-loss forms and, on November 27,

1981, returned the completed proof-of-loss forms to Shelter. (JA I, 116, 117) On December 10, 1981, Shelter acknowledged receipt of the proof-of-loss forms. Then, on December 18, 1981, Shelter wrote Mr. and Mrs. Conner stating that it was denying coverage on the house, based on alleged misrepresentations of Mr. Conner in an application for insurance. (JA II, 220, 221)

In addition, on two occasions between the application for the first homeowners policy, and the fire loss, which occasions were December 13, 1976 and October 13, 1980, applications were made for changes in the homeowners policy in order to add lending institutions as second mortgagees. Each of those appli-

cations contained a question about prior crimes. However, Shelter did not request Mr. and Mrs. Conner to answer the questions. (JA II, 203, 205) After the fire, Shelter paid the lending institutions. (JA I, 133)

Shelter offered its underwriters and its underwriting rules to support its position that the homeowners policy would not have been issued had the information with respect to past crimes been furnished at the time the initial application was obtained.

Although the jury determined that Mr. Conner did misrepresent his answer regarding past convictions on the homeowners application, it further determined that Shelter would have issued the

policy regardless of the misrepresentations.

REASONS FOR GRANTING THE WRIT

Shelter had the burden of proof to show that the alleged misrepresentations were material to the issuance of the policy of insurance. 7 Couch on Insurance (Rev. ed. 1985), § 35.95, pp. 163-165.

Federal Rule of Evidence 401 states:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Federal Rule of Evidence 402 states:

> "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pur-

> suant to statutory authority. Evidence which is not relevant is not admissible."

Even though Shelter offered its underwriters and underwriting rules to support its position of materiality of the alleged misrepresentations, the evidence set out in the pertinent facts above is competent, relevant and sufficient, for the jury determination in favor of Mr. and Mrs. Conner. Specifically, the following summary of facts and inferences support a jury verdict that evidence of past crimes would not have been material to the issuance of the homeowners policy:

1. The same Shelter agent who obtained the homeowner's application obtained the automobile application ten days later. The automobile application contained information of a past crime.

2. The automobile policy was issued and the homeowners policy was not cancelled.

3. After the initial application for homeowners insurance by the Conners, additional applications were obtained by Shelter whereby lending institutions were added as payees to the Conners' homeowners policy. These two additional applications were made on October 13, 1980 and on December 13, 1976. The Conners were not required to answer further questions on either application.

4. The Shelter adjuster who investigated the incident and interviewed Mr. Conner conveyed information of past crimes to Shelter on October 12, 1981. Thereafter, Shelter mailed Mr. and Mrs. Conner proof-of-loss forms, which they prepared and returned on November 27, 1981. Shelter denied coverage on December 18, 1981.

5. The Shelter adjuster did not know of any ironclad policy of Shelter to deny similar claims.

6. Even though the jury determined that a false answer was given

by Mr Conner in the original application in April of 1976, Shelter continued to collect premiums for approximately five years, added additional mortgagess, received notice of the fire, investigated it, sent the Conners proof of loss forms, received the proof of loss forms, and then alleged misrepresentation and denied coverage. Shelter paid the lending institutions, however.

7. None of the crimes of which Mr. Conner was convicted involved arson or self-destruction of property.

8. Shelter failed to continue to request information about crimes after the initial application. If Mr. Conner had committed crimes after the initial application and during the time the other applications were taken which added lending institutions, the subsequent hypothetical crimes were of no import to Shelter.

The Majority Opinion of the United States Court of Appeals for the Sixth Circuit weighed the evidence. This is

improper. In reviewing the jury verdict for the plaintiffs, which awarded them the homeowners policy proceeds, two of the panel of the Sixth Circuit wrote:

> "However, this court concludes that the issuance of the automobile policy does not necessarily lend support to the determination that Shelter would have issued the homeowners policy had it known the true facts of Conner's criminal history. On his application for automobile insurance, Conner denied having 'been arrested for any offense other than traffic violations.' The record failed to disclose evidence that Shelter utilized the same rules for issuing automobile insurance and homeowners insurance. Even if Shelter followed the same guidelines for both types of coverage, those rules expressly precluded issuing insurance to persons who had 'been convicted for any offense other than traffic violations within the last 5 years.' (emphasis supplied)." [Appendix A-33, A-34]

The probative value of the evidence of the issuance of the automobile policy

demonstrates that Shelter does provide policies of insurance when it has information of past crimes. To minimize the evidence, as the majority writes above, is to weigh the evidence. The majority is trying to make a distinction in the evidence which the jury could have made, and accepted, or rejected. The evidence was admissible within the parameter of evidence defined by the Federal Rules of Evidence above. It was inappropriate for the majority to weigh evidence when it is evidence that was freely admitted into the trial of this case.

Shelter had all of its underwriting rules readily available. It offered its rules for issuance of property insurance to support is position. It failed to

produce its underwriting rules for the issuance of automobile insurance or to distinguish the issuance of that policy from the issuance of a policy for property insurance. The majority weighs the evidence when it makes assumptions about the underwriting rules, when no such proof as to their substance was offered. It is reasonable to assume, however, that if the underwriting rules for the issuance of automobile policies were favorable to Shelter's position, Shelter would have produced them. It did not. The proof the jury could consider was that Shelter issued an insurance policy when it had information of a prior crime. That evidence had been admitted without objection and contradicted Shelter's

proof.

As a second basis for reversing the decision of the district court entering judgment for the plaintiffs on the jury verdict, the majority opinion of the Sixth Circuit identifies certain testimony of the agent who took the application for the homeowners insurance policy. The point of this focus is to show that it is unequivocal that the agent would have acted as he testified had he known that Mr. Conner was convicted of previous crimes.

However, the evidence recited above provides a reasonable basis for the jury to disbelieve the agent. Further, the agent worked on a commission basis. Specifically, the agent was asked:

"Q. And if Mr. Conner had told you or if you had asked him that question and he had told you that he had been convicted of a crime and that you knew there was a possiblity that the company wouldn't write the policy, you wouldn't get the commission, would you?

"A. That's correct." (JA I, 130)

The jury did not have to believe the agent, in view of his interests.

Shelter had the burden of proof. The jury was entitled to consider the total proof in the case. There was admissible proof from which the jury could find for Mr. and Mrs. Conner. The majority opinion does not rule such proof inadmissible. It is therefore weighing the proof and that is inappropriate. The United States Court of Appeals for the Sixth Circuit's opinion, in effect,

treats the testimony of Shelter's witnesses as uncontradicted. It was questionable and the jury did not have to believe all or any of it.

This Court wrote in Atlantic & Gulf Stevedores v. Ellerman Lines, 369 U.S. 355, 7 L.Ed.2d 798, 82 S.Ct. 780 (1962), that:

> "We might agree with the Court of Appeals had the questions of fact been left to us. But neither we nor the Court of Appeals can redetermine facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.'" Id. at 803

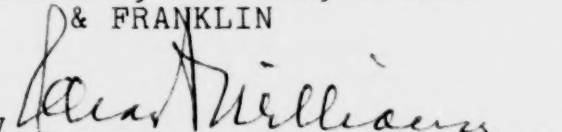
CONCLUSION

The opinion of the U.S. Circuit Court of Appeals for the Sixth Circuit in this case is at substantial variance from

accepted judicial proceedings ir that the opinion weighs the evidence after the jury verdict. That is inappropriate and petitioners request this Court to grant certiorari to review the proceedings in this case.

Respectfully submitted,

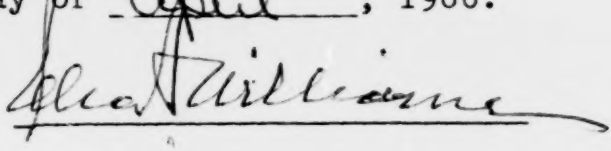
WILLIAMS, HOUSMAN, SPARKS & FRANKLIN

By 
1700 Kentucky Avenue
Paducah, Kentucky 42001

Attorneys for Petitioners

CERTIFICATION

I hereby certify that three copies of this Petition have been served upon all parties required to be served by Rule 28 of this Court by mailing the same, first class postage prepaid, as follows: WHITLOW, ROBERTS, HOUSTON & RUSSELL, P.O. Box 995, Paducah, Kentucky 42002-0995. This the 14 day of April, 1986.



APPENDIX

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A-1

JUDGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT

District
Western District of Kentucky at Paducah

Case Title
RONALD W. CONNER ET AL
V
SHELTER MUTUAL INSURANCE COMPANY

DOCKET NUMBER
C82-0035 P(J)

NAME OF JUDGE OR MAGISTRATE
EDWARD H. JOHNSTONE, JUDGE

[X] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[ ] Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Plaintiffs be awarded $58,529.11 as stipulated, and $20,000.00 damages pursuant to Jury Verdict, for Total amount of $78,529.11.

Final and appealable judgment, with no just cause for delay.

Entered Feb. 16, 1984
Clerk, U.S. District Court
/s/ By M. Evans
Deputy Clerk

Clerk
JESSE W. GRIDER

Date
02-16-84

(BY) DEPUTY CLERK
/s/ Mayme J. Evans

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

RONALD W. CONNER and/or
BEVERLY B. CONNER PLAINTIFFS

V. CIVIL ACTION NO. 82-0035-P

SHELTER MUTUAL INSURANCE
COMPANY DEFENDANT

MEMORANDUM OPINION

Ronald and Beverly Conner (Conner) sued Shelter Mutual to recover on a fire insurance policy. Shelter Mutual denied coverage, claiming that Conner had made material misrepresentations in his application for insurance and that the misrepresentations acted to void the policy. The case was ultimately tried before a jury on February 8 and 9, 1984. At the close of proof, three issues went to the jury. First, was Conner responsible for the alleged misrepresentations or was the application signed in blank

and completed by a Shelter Mutual agent? Second, if Conner did make the misrepresentations, would Shelter Mutual have issued the policy anyway; in other words, were the misrepresentations "material?" Third, depending on the outcome of the first two issues, did Shelter Mutual act in bad faith in refusing to pay Conner's claim? These issues were presented to the jury through the following interrogatories:

> 1. Do you believe from the evidence that at the time Ronald Conner signed the application the answer to question No. 4, as it appers (sic) above his signature on exhibit No. 7, was blank?
>
> 2. Do you believe from the evidence that the defendant would have issued

the homeowners' policy if it had known of Mr. Conner's prior convictions?

3. Do you believe from the evidence that the defendant breached its duty of good faith in effecting a fair and reasonable settlement of plaintiffs' claim?

The jury concluded that Conner was responsible for the misrepresentations, but that Shelter Mutual would have issued the policy even if it had known the true facts. Thus, the verdict was for Conner on the policy. The jury also concluded that Shelter Mutual acted in bad faith in failing to pay the Conner claim and awarded Conner Twenty Thousand Dollars in additional damages. In response to the court's entry of judgment, Shelter Mutual, pursuant to Federal Rule of Civil

Procedure 50(b), has timely moved for a judgment notwithstanding the verdict. In the alternative, Shelter Mutual seeks a reduction of the damages awarded for its alleged bad faith denial of payment. Conner has timely moved, pursuant to Federal Rule of Civil Procedure 59(e), to alter the judgment to include an award of pre-judgment interest.

A.

Shelter Mutual seeks a judgment n.o.v. both on the contract claim and on the unjustified denial of payment claim. "Judgments n.o.v. are legally equivalent to directed verdicts, and the same standards govern the consideration of either." Warkentien v. Vondracek, 633 F.2d 1, 6 (6th Cir. 1980). Thus, the question is whether there was sufficient

evidence to allow the jury to properly return a verdict in favor of the party opposing the motion. See Patrick v. South Central Bell Tel. Co., 641 F.2d 1192, 1197 (6th Cir. 1980). In diversity cases, this court must look to Kentucky law to determine whether the evidence is sufficient to withstand a motion for judgment n.o.v. Warkentien, 633 F.2d at 6. Finally, when ruling on a motion for judgment n.o.v., the court must consider the evidence in the light most favorable to the party opposing the motion. Upton v. Western Life Insurance Company, 492 F.2d 148, 149 (6th Cir. 1974).

In Kentucky a misrepresentation voids an insurance policy if the misrepresentation is material to the acceptance of the risk or if the

insurance company would not have issued the policy if the true facts had been known. Ky. Rev. Stat. Section 304.14-110. In the present case, the jury found that Shelter Mutual would have issued the policy even if it had known of Conner's past criminal convictions. Shelter Mutual argues that this conclusion is not supported by the evidence before the jury. Indeed, Shelter Mutual contends that the only evidence on materiality was provided by its own underwriters and is conclusive on the issue. The underwriters stated that Shelter Mutual, pursuant to established underwriting rules, would not have issued the policy if it had known of Conner's convictions. In response to Shelter Mutual's contentions, Conner argues that there was evidence before the jury upon

which the jury could properly rely in reaching a decision in favor of Conner. At the close of testimony the court determined that the issue should go to the jury. The question then, as previously stated, is whether there was sufficient evidence to allow the jury to return a verdict on the issue of materiality. For the reasons given below, the court concludes that there was sufficient evidence.

Ten days after it issued Conner's homeowner's policy, Shelter issued Conner an automobile policy. Before issuing this policy, however, Shelter Mutual, through its representative agent, was aware that Conner had been convicted of driving while intoxicated. This evidence was the strongest evidence in Conner's

favor on the issue of materiality. Even though it involved a different type of policy, and even though only one of Conner's convictions was revealed, it did demonstrate that Shelter Mutual issued insurance even when it knew of an applicant's prior convictions. Moreover, the evidence contradicted testimony from Shelter Mutual's underwriters and provided a basis for disbelieving the underwriter's testimony.

There was also testimony by Shelter Mutual's agent, Richard Vasseur, that if Conner's convictions had been revealed in his fire insurance application Shelter Mutual would have merely looked into the matter rather than immediately informing Conner that he could not be insured. (Vasseur was the only one to testify to

this effect at trial. According to the court reporter's notes, Mr. McCubbin's deposition was not read to the jury). This testimony provides further support for Conner's contention that past criminal convictions were not, contrary to Shelter Mutual's position, automatically conclusive on whether insurance would be issued. Even though Vasseur was merely a Shelter Mutual field agent, the court finds that his testimony is relevant to how Shelter Mutual deals with applicants with criminal convictions. Vasseur may not be responsible for the ultimate issuance of the policy, but his position does provide him knowledge on how Shelter Mutual deals with applicants.

The court finds the above evidence was sufficient for the jury to return a verdict on the issue of materiality.

Pursuant to the court's instructions, the jury weighed the evidence, decided credibility, and reached a decision in favor of Conner. The court is not free to weigh the evidence in its own manner, insert its own views on credibility or, in view of its holding on the sufficiency of the evidence, to alter the jury's decision. Shelter Mutual' (sic) motion for judgment n.o.v. must be denied on Conner's claim on the fire insurance policy.

In addition to the contentions discussed above, Conner presented other evidence and contentions in support of his position that there was sufficient evidence to allow the jury to return a verdict on materiality. For example, Conner argued that the fact that Shelter

Mutual did not investigate his past until after the fire occured (sic) supports a finding that Conner's past convictions were not material. The court concludes, however, that Shelter Mutual was under no duty to perform an investigation prior to the fire and, therefore, the lack of an investigation was not relevant to materiality. The remainder of Conner's contentions suffer from similar problems. Because of these problems, the court has not relied upon the contentions in denying the judgment n.o.v. as to the verdict on the insurance policy. Moreover, because the evidence discussed earlier was sufficient to allow the issue of materiality to be decided by the jury, there is no need to rely upon the other contentions.

B.

The Kentucky Court of Appeals recently held that an insurance company can be liable for damages if it "unjustifiably" denies payment to an insured, under an insurance contract with that insured. Feathers v. State Farm Fire & Casualty Co., No. 83-CA-158-MR (Ky. Ct. App. Aug 5, 1983), reported in 30 Ky. Law Summary 9, at 8, (Aug. 5, 1983) discretionary review denied, ___ S.W.2d ___, reported in 31 Ky. Law Summary 5, at 21 (_____ 1984). Shelter Mutual does not dispute that this is now the law of Kentucky; however, it argues that the evidence presented in this case does not support a finding that it unjustifiably denied Conner's claim.

Although Feathers establishes a cause of action for unjustified denial of

payment it offers no clear guidance on the standards for proving such a claim. Feathers deals with "unjustified" denial of payment. Read literally, this could mean that whenever an insurance company's basis for denying payment is found to have been incorrect, the company is then liable for its denial of payment. See K. Harvey & T. Wiseman, First Party Bad Faith: Common Law Remedies and a Proposed Legislative Solution, 72 Ky. L.J. 141, 173-174 (1983-84). Such an intrepretation is possible; however, given that the opinion merely deals with whether a claim for denial of payment is possible and not with the specifics of presenting such a claim, this court will not expand the Feathers language in deciding the level of proof necessary to recover for a denial of payment. Instead of adopting a

literal reading of Feathers, the court concludes that in order to establish a claim for unjustified denial of payment, a claimant must show that the denial was made in "bad faith" and not just that the denial was incorrect. This conclusion is supported by Kentucky cases dealing with situations where an insurance company breaches its duty to settle claims made against its insured. Those cases require that the insurance company's failure be in "bad faith." See Manchester Ins. & Indem. Co. v. Grundy, 531 S.W.2d 493 (Ky. 1975), cert denied, 429 U.S. 821, 97 S.Ct. 70 (1976). See generally Harrod v. Meridian Mutual Ins. Co., 389 S.W.2d 74 (Ky. 1964); Hoskins v. Aetna Life Ins. Co., 452 N.E.2d 1315 (Ohio 1983).

The court can find no evidence in

the record to indicate that Shelter Mutual's denial of payment was made in "bad faith." Although a workable definition of bad faith has not been developed by the Kentucky courts for claims under Feathers, it is clear that "bad faith" requires some unreasonable action and that mere negligence is not sufficient. See Grundy, 531 S.W.2d at 497-501. Moreover, a claimant cannot recover merely by showing that the basis for the denial was incorrect. In the present case, Shelter Mutual denied payment after learning that Conner had misrepresented himself by failing to reveal on his application that he had ten previous felony convictions. In the light of the jury's verdict on materialtiy, the denial was incorrect; however, there was nothing to indicate that it was unreasonable.

Since Conner failed to present any evidence of an unreasonable or "bad faith" denial of payment, the court erred in not directing a verdict for Shelter Mutual.

There is an additional reason why the jury's verdict on unjustified denial of payment cannot stand. The court has concluded that the claim requires a showing of "bad faith." Kentucky has held that in third-party situations, situations where the insurance company is alleged to have acted in "bad faith" in failing to settle a claim against an insured, the question of "bad faith" is for the court and not the jury. Grundy, 531 S.W.2d at 500-501. Although the issue has not been addressed in the first-party situation presented by Feathers, where the claim involves

failing to pay a claim made by an insured, the same considerations should apply. See generally Grundy, 531 S.W.2d at 500-501. Under this reasoning, Conner's claim of unjustified denial of payment should have been decided by the court and not the jury. Since the court has concluded that there was no evidence indicating "bad faith" on the part of Shelter Mutual, the court should have granted judgment to Shelter Mutual and not submitted the issue of "bad faith" to the jury.

The court will correct its errors by granting Shelter Mutual's motion for judgment n.o.v on the claim for unjustified denial of payment.

C.

Conner seeks to alter the judgment

to include an award of pre-judgment interest. Kentucky law permits such an award where the action is based upon a liquidated claim. Alford v. Continental Casualty Co., 376 F.Supp. 237, 238 (E.D. Ky. 1974). The court will alter its judgment to include an award of pre-judgment interest on the judgment on the contract, i.e., on the amount of $58,529.11. This will not result in a double recovery for Conner. The court must now determine the time from which the interest is to be calculated. "As a general rule, interest on the amount payable under an insurance policy commences to run from the time when the loss is payable by the terms of the policy." Travelers Ins. Co. v. Hawks, 517 S.W.2d 740, 741 (Ky, 1974). Under the contract between Conner and Shelter Mutual,

Conner's loss was payable sixty days after proof of loss. Proof of loss was received on November 28, 1981, and the sixty day period passed on January 27, 1982. On December 18, 1981, however, Shelter Mutual denied Conner's claim. When an insurance company denies liability before occurrence of a prerequisite for payment, the company waives the requirement and incurs an obligation to pay from the date of denial. See Hawks, 517 S.W.2d at 740-741. The court concludes that interest should run from December 18, 1981, the date Shelter Mutual denied Conner's claim.

Having granted a judgment n.o.v. on the claim for unjustified denial of payment, the court need not consider Conner's request for interest on the

$20,000.00 awarded on that claim.

An appropriate order will be entered.

DATED: August 21, 1984.

/s/ Edward H. Johnstone, Judge
United States District Court

Entered
8/22/84
Jesse W. Grider, Clerk
/s/ By M. A. Watson
Deputy Clerk

Nos. 84-5837 and 84-5851

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD W. CONNER and/or
BEVERLY B. CONNER,
Plaintiff-Appellee,
Cross-Appellant

v.

SHELTER MUTUAL INSURANCE CO.,
Defendant-Appellant,
Cross-Appellee

ON APPEAL from the United States
District Court for the
Western District of Kentucky.

Decided and Filed December 18, 1985

Before: KRUPANSKY and MILBURN, Circuit Judges; and NEESE,* Senior District Judge.

NEESE, Senior (Retired) District Judge, delivered a separate opinion (p. 9) concurring specially and dissenting with the per curiam opinion.

*Hon. C. G. Neese, Senior (Retired) District Judge, United States District Court for the Eastern District of Tennessee, sitting by designation.

PER CURIAM. Defendant appealed and plaintiffs cross-appealed from a judgment entered in favor of plaintiffs and from partial judgment notwithstanding the verdict in this action on a homeowners insurance policy.

Defendant, Shelter Mutual Insurance Company (Shelter), issued Ronald and Beverly Conner a homeowners policy in 1976 which it renewed annually through 1981. On October 3, 1981, fire damaged the Conners' home and destroyed its contents. After the Conners submitted a claim, Shelter conducted an investigation which disclosed that, contrary to his statements on his application for insurance, Ronald Conner (Conner) had been convicted of several crimes.[1]

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[1] The application contained the question, "[h]ave you or any member of your household ever been convicted of a crime?" Ronald Conner responded "no" notwithstanding the fact that he had been convicted of eight crimes prior to 1976. The parties stipulated that Ronald Conner had been convicted of the following crimes:

	DATE OF CONVICTION	CRIME
1	February 21, 1968	Larceny of an Automobile
2	February 27, 1968	Speeding
3	December 1, 1969	Uttering worthless check
4	December 1, 1969	Uttering worthless check

Shelter disclaimed the policy coverage, asserting that Conner had made material misrepresentations on his applications for insurance that rendered the policy void ab initio under the terms of the policy and K.R.S. 304.14-110. The Conners commenced this action against Shelter seeking damages in the amount of the insurance coverage and compensatory damages for Shelter's alleged bad faith refusal to pay the claim. The parties stipulated that the Conners' loss

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	DATE OF CONVICTION	CRIME
5	December 1, 1969	Uttering worthless check
6	December 1, 1969	Uttering worthless check
7	November 16, 1970	Speeding
8	June 7, 1973	Cold checking
9	June 7, 1973	Grand Larceny of automobile
10	June 6, 1974	Escape from jail

exceeded the amount of coverage. The case was tried before a Jury on February 8 and 9, 1984.

Under Kentucky law, a misrepresentation voids an insurance policy if the misrepresentation is "material" to the acceptance of risk or if the insurance company would not have issued the policy if the true facts were known. K.R.S. 304.14-110.[2]

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[2] K.R.S. 304.14-110 provides:
304.14-110 Representation in applications

All statements and descriptions in any application for an insurance policy or annuity contract, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent, or

The court submitted the following issues to the jury: (1) whether the misrepresentation was material to Shelter's acceptance of risk; (2) whether Shelter would not have issued the policy had it known of the misstatement; and (3) whether Shelter's refusal to honor the claim constituted bad faith. The court refused to instruct the jury on plaintiffs' claim for punitive damages.

> (2) Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

The jury concluded that Shelter would have issued the policy even with knowledge of the true facts. The district court accordingly entered a verdict in favor of the Conners on the policy. The jury also determined that Shelter acted in bad faith in refusing to pay the claim and awarded the Conners an additional $20,000 in damages.

Shelter moved for judgment notwithstanding the verdict on both issues. The district court, in a memorandum opinion published at 600 F.Supp. 24 (W.D. Ky. 1984), denied the motion as to the policy proceeds, concluding that the evidence supported the jury's verdict that Shelter would have issued the policy even with knowledge of the misrepresentation. Id. at 27. The district court granted judgment notwithstanding the verdict on

the issue of bad faith, stating that it should have directed a verdict against the Conners on that issue for two reasons: (1) the Conners failed to present any evidence of an unreasonable or bad faith denial of payment; and (2) under Kentucky law the question of bad faith was properly one for the court and should therefore not have been submitted to the jury. Id. at 27-28.

Shelter appealed the judgment, charging insufficient evidence to support the finding that Shelter would have issued the policy even with full knowledge of the misrepresentation. The Conners cross-appealed, asserting that the district court erred in granting judgment notwithstanding the verdict on their bad faith claim, and in refusing to

instruct the jury on punitive damages.

In diversity cases such as this, the court must look to state law to determine if the evidence is sufficient to withstand a motion for judgment notwithstanding the verdict. Calhoun v. Honda Motor Co., Ltd., 738 F.2d 126, 129 (6th Cir. 1984). In evaluating the sufficiency of the evidence under Kentucky law, the court must draw all fair and rational inferences from the evidence in favor of the party opposing the motion and a verdict should not be directed unless the evidence is insufficient to sustain the verdict. Id.

In this case, critical testimony was provided by Roger Ellingson (Ellingson) and Gene Brechler (Brechler), who were both senior underwriters in Shelter's Property Division in April, 1976, when

the policy was issued to the Conners. Ellingson stated that he recalled a telephone conversation with Richard Vasseur (Vasseur), the field agent to whom Conner submitted an application. In that conversation, Ellingson authorized Vasseur to bind coverage for the Conners. When asked, hypothetically, how he would have responded had he known that Conner had been convicted of a crime, Ellingson answered that he would have "asked for more information about the crime." Ellingson testified further, "I would not have given the verbal permission for the binder," if he had known that Conner "had been convicted of grand larceny, of cold checking, and of escaping from jail."

Brechler was the underwriter who approved the issuance of the Conners'

policy. He testified that he would "have found out what had been the crime he [Conner] was convicted of," if Conner had responded truthfully in the application for insurance. When asked, hypothetically, whether he would have approved the application had he known that the crimes were "grand larceny, cold checking and escaping from jail," Brechler answered "no, sir, I would have had to have declined the application."

Both Ellingson and Brechler testified that Shelter's underwriting rules for issuing homeowners policies, which were in effect at the time the Conners' policy was issued, would have mandated rejection of the application had they known the extent and nature of Ronald Conner's criminal record. Shelter's rules introduced at trial

precluded the issuance of policies to "persons with poor credit reputation, such as a history of bad checks," and further prohibited coverage "[w]hen the applicant or a member of his household has been convicted for any offense other than traffic violations within the last 5 years."

In its opinion granting partial judgment notwithstanding the verdict, the district court set forth two reasons for sustaining the jury's finding on the issue of materiality. First, the district court relied upon the evidentiary disclosure that 10 days after issuing the homeowners policy to the Conners, Shelter approved and issued an automobile insurance policy to Ronald Conner. In his application for automo-

bile insurance, Conner acknowledged that he had been convicted of driving while intoxicated. The district court reasoned that issuance of the automobile insurance policy with knowledge of the conviction for DWI, "demonstrate[s] that Shelter Mutual issued insurance even when it knew of an applicant's prior convictions." 600 F.Supp. at 26. The district court further concluded that this evidence contradicted and provided a basis for discrediting the testimony of Shelter's underwriters.

However, this court concludes that the issuance of the automobile policy does not necessarily lend support to the determination that Shelter would have issued the homeowners policy had it known the true facts of Conner's criminal

history. On his application for automobile insurance, Conner denied having "been arrested for any offense other than traffic violations." The record failed to disclose evidence that Shelter utilized the same rules for issuing automobile insurance and homeowners insurance. Even if Shelter followed the same guidelines for both types of coverage, those rules expressly precluded issuing insurance to persons who had "been convicted for any offense other than traffic violations within the last 5 years." (emphasis supplied)

The second basis upon which the district court relied for supporting the jury's finding regarding materiality was the testimony of Vasseur, a Shelter field agent. Vasseur testified as follows:

Q. Mr. Vasseur, I ask you to look at question #4 that appears above the signature of Mr. Conner. I shall ask you hypothetically if Mr. Conner had answered that question #4 concerning the crime, yes, what if anything would you have done?

A. Well it would have depended upon what those crimes were, and then if those crimes would not have fit into the company underwriting rules I would have told him that they did not fit into the company rules and that I would not have been able to provide the insurance.

Q. What if he had answered some crimes that you were not sure of? What would you have done?

A. If I wasn't sure about the risk then I would have checked with the underwriting department prior to binding the coverage.

The district court concluded that the foregoing testimony supported the contention that "past criminal convictions were not, contrary to Shelter Mutual's position, automatically conclu-

sive on whether insurance would be issued." 600 F.Supp. at 26-27. In this regard, the district court improperly framed the issue as advanced by Shelter. Through the testimony of its underwriters, Shelter argued that the underwriters, in accordance with underwriting rules, would have refused insurance to an applicant who had been convicted of non-traffic offenses such as those for which Conner had been convicted. Rather than contradicting the testimony of Ellingson and Brechler, Vasseur's testimony was entirely consistent with that testimony. Vasseur testified that if certain crimes were involved, he would not have accepted the application, and if he were uncertain of the action to be taken, he would have first consulted with the underwriting

department.

In sum, the district court failed to identify any evidence to support the jury's finding that Shelter would have issued the policy even had it known the true facts.

The Conners have asserted that the district court erred in granting judgment notwithstanding the verdict on their bad faith claim. The district court cited the recent Kentucky Court of Apeals case of Feathers v. State Farm Fire & Casualty Co., 667 S.W.2d 693 (Ky.Ct.App. 1983), discretionary review denied, (Ky. 1984), which recognized a cause of action for unjustified denial of payment. This court concludes that the district court reasonably interpreted Feathers to impose on the claimant the burden of proving an unreasonable or bad faith denial of the

claim. Shelter had denied payment only after learning that Conner had misrepresented material facts in the application for insurance by failing to fully disclose his extensive criminal record. Regardless of whether the denial was correct, the Conners provided no evidence to demonstrate that the denial was unreasonable or in "bad faith." Accordingly, the district court granted judgment notwithstanding the verdict on the bad faith issue.

The Conners have lastly contended that the district court erred in refusing to instruct the jury on punitive damages. Punitive damages, however, are only awarded in the presence of "reckless" or "malicious" conduct. Examining Kentucky law on punitive dama-

ges, this court has stated:

> Such damages are given only on account of the wanton, reckless, malicious or offensive character of the acts complained of.

Signer v. First Nat'l Bank & Trust Co., 455 F.2d 382, 386 (6th Cir. 1972). Having concluded that the district court correctly found an absence of bad faith, a fortiori this court finds that the district court properly rejected the Conners' claim for punitive damages.

For the foregoing reasons, the judgment of the district court is REVERSED as to its denial of Shelter's motion for judgment notwithstanding the verdict, which sought to overturn the jury's finding of an absence of material misrepresentation, and AFFIRMED as to the rejection of the Conners' claim of bad faith and for punitive damages.

NEESE, Senior (retired District) Judge, concurring specially and dissenting. I concur with the majority except I would also affirm the District Judge's denial of the insurer's motion for judgment notwithstanding the verdict of the jury relating to the proceeds of the policy implicated.

The appellees made out a prima facie case against the defendant, and support for the defense of the insurer was dependent solely on the testimony of witnesses who were its employees with an employment interest; this created an issue of credibility and weight for determination by the jury, as the evidence they provided was hardly "possible of contradiction in the circumstances." See Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 218, 51 S.Ct. 453, 457, 75 L.Ed. 983 (1931).

Federal R. Civ. P. 50 "has not taken away from juries and given to judges any part of the exclusive power of juries to weigh the evidence and determine contested issues of fact." Berry v. United States, 312 U.S. 450, 452-453, 61 S.Ct. 637, 638, 85 L.Ed. 945 (1941); Wolfel v. Sanborn, 555 F.2d 583, 593 (6th Cir. 1977) (District Judge not permitted to consider the credibility of evidence in determining motion for directed verdict).

The jury may have disregarded as unbelievable the defense witnesses and found specifically the fact that this insurer would have issued the policy even if it had known the true facts covered up by the misstatement of Mr. Conner. This "Court of Appeals can[not] redetermine facts found by the jury." Atlantic &

Gulf Stevedores, Inc. v. Ellerman Lines, 369 U.S. 335, 358-359, 82 S.Ct. 780, 782, 7 L.Ed.2d 798 (1962) (a diversity case). I dissent respectfully from this part of the per curiam only.

NOS. 84-5837/5851

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD W. CONNER, AND/OR BEVERLY B. CONNER, Plaintiff-Appellee, Cross Appellants, vs. SHELTER MUTUAL INSURANCE COMPANY Defendant-Appellant Cross Appellee	)	FILED JAN 14, 1986 JOHN P. HEHMAN, CLERK ORDER

BEFORE: KRUPANSKY and MILBURN, Circuit Judges; NEESE, Senior District Judge*

Upon consideration of the petition for rehearing filed herein by the plaintiff-appellee, the court concludes that the issues raised therein were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby

is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

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* The Honorable C. G. Neese, Senior U.S. District Judge for the Eastern District of Tennessee, sitting by designation.